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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 412

ANGELO INCISO,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE F. CALLAGHAN
105 West Adams Street
Chicago 3, Illinois

MELVIN F. WINGERSKY
1002 Laura Lane
Marion, Illinois
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Angelo Inciso, respectfully prays that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit in the case of United States of America, Plaintiff-Appellee v. Angelo Inciso, Defendant-Appellant, No. 13058.

OPINION AND JUDGMENT DELIVERED IN THE COURTS BELOW.

Indicted for a statutory misdemeanor, provided for in § 302 (b) of the Labor-Management Relations Act of 1947, coupled with 18 U.S.C.A. § 2 (b), Inciso, defendant below, was sentenced, after a jury's verdict of guilty, to

imprisonment for a period of one (1) year on each of the 22 Counts; consecutive sentences were imposed on the first 10 Counts and the sentences on Counts 11 to 22, both inclusive and to run concurrently with each other and concurrently with the sentence given on Count 10. Inciso was also fined $1,000 on each one of the 22 Counts—these fines were cumulated in the sum of $22,000.00. In short, Inciso was sentenced to 10 years imprisonment and fined $22,000 for a misdemeanor.

This judgment was entered June 23, 1960, in the United States District Court for the Northern District of Illinois.

On June 30, 1961 that judgment was affirmed in an unreported opinion handed down by the United States Court of Appeals for the Seventh Circuit. The Opinion is appended to this Petition and contained in the certified record.

Petition for rehearing was denied on August 17, 1961. On August 23, 1961, the mandate of the United States Court of Appeals was stayed for thirty days.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. (a) Since the defendant elected not to testify in his own behalf, have his rights under the United States Constitution, Amendments 5, 6 and 8, and Section 3481 of Title 18, United States Code, been invaded, when the prosecution was permitted to read to the trial jury in its case in chief, under the guise of "admissions against interest" and "false, exculpatory statements", purported testimony given by the defendant before a Committee of

the United States Senate, when the record is clear that none of the employers named in the indictment were mentioned by name in that Senate testimony?

(b) Was not the error thereof compounded by the prosecutor in summation repeatedly telling the jury, with reference to this Senate testimony, Inciso "lied"; "these statements are not true"; "he lied"; he, Inciso, was "lying his head off"; "he lied, and he lied all the way through"; "the only person whom it suggest (*sic*) it is conclusively proven has lied at all in Inciso. He is the liar."

(c) Was not the total effect thereof to place the defendant on trial for perjury, rather than the statutory misdemeanor?

2. If moneys were received by Local 286 from several different and unrelated employers, named in the indictment, is the unit of prosecution under § 302 of the Labor-Management Relations Act of 1947 (61 Stat. 157, 29 U.S.C. § 186) the failure to have one master trust fund or does each employer's aggregate payments constitute separate, and, at bar, 22 units of prosecution?

3. Does the number of employers who allegedly paid moneys to Local 286 determine the units of prosecution or, more soundly, isn't the unit of prosecution the single impulse which resulted in the alleged failure to set up a statutory trust fund under § 302?

4. Since neither the wording of § 302 of the Act nor its legislative history points clearly to whether a single trust fund is required without regard to the number of employers allegedly paying moneys to Local 286, or whether payments from employers absent any statutory trust fund, constitutes separate offenses as to each such employer, is then this that circumstance when this Court applies a policy of lenity and adopts the less harsh mean-

ing, *e.g.*, the crime, if any, is the single failure to have established a statutory trust fund.

5. Whether there being a plain showing of gross abuse of discretion by the trial court in assigning punishment against Inciso, the Court of Appeals has so far sanctioned the district court's departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision?

6. Does § 302 (b) and (d) of the Labor-Management Relations Act of 1947 (61 Stat. 157, 29 U.S.C.A. § 186 (b)) authorize the quantum of punishment imposed on this petitioner?

7. Whether imprisonment for one year on each of 22 Counts, sentences Counts 1 to 10 running consecutive, and the sentences on Counts 11 through 22 running concurrently with Count 10, and each other, together with a $22,000.00 fine, for a misdemeanor under § 302 (d) of the Act, are wholly disproportionate to the failure to set up a statutory trust fund under § 302 (c) (5) of the Act?

8. Whether the indictment was wholly and fatally defective because of the failure to allege that Inciso was a "representative" within the meaning and purport of § 302 (b) of the Labor-Management Relations Act of 1947?

9. Whether, under the evidentiary setting of this case in the District Court, it was reversible error for the trial judge to refuse to give either of the following instructions:

(a) "Section 186(a) of the statute here in question makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

During the trial many employer witnesses testified in behalf of the Government in this case that they

had paid the amounts or part of the amounts of money which are the subject of the respective counts of the indictment in connection with which these witnesses were called. These employer witnesses are shown by the evidence not to have been indicted or otherwise proceeded against for the acts about which they testified.

"You may take these facts into consideration when considering your verdict and in weighing the testimony of those employer witnesses and in deciding the credibility which should be attached to their testimony. It is for you to determine whether these respective employer witnesses have received any reward or immunity from prosecution, and if you believe that any of these employer witnesses have received any such reward or immunity from prosecution, or hoped or believed that he had obtained or would obtain any such reward or immunity from prosecution, you may consider that fact when weighing the testimony of the respective employer witnesses." (D-24, App. 338)

(b) "Section 186(a) of the statute here in question makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

There is evidence in this trial that none of the employer witnesses who testified for the Government in this case have been indicted or otherwise proceeded against for any violation of the foregoing statute.

You may take that fact into consideration when considering your verdict and in weighing the testimony of those employer witnesses and in deciding the credibility which should be attached to their testimony. The motive of the witnesses in testifying is always important and if you believe that any witness has testified because of any hope or promise of im-

munity from prosecution, you may consider that fact in deciding the credibility of such witness." (D-25, App. 339)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U. S. Constitution, Amendment 5."

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence. U. S. Constitution, Amendment 6."

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U. S. Constitution, Amendment 8."

STATUTES.

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. § 186:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,*

That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

"(d) Any person who wilfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both . . ."

Title 18, U.S.C. § 2, 62 Stat. 684, 65 Stat. 717:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever wilfully causes an action to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." June 25, 1948, c. 645, 62 Stat. 833, 18 U.S.C.A. § 3481.

STATEMENT OF THE CASE.

The basis for federal jurisdiction in the United States District Court for the Northern District of Illinois, Eastern Division is 18 U.S.C.A. § 3231.

The framework of each one of the 22 counts in the indictment, returned October 23, 1956 (App. 4-5)* follows:

"1. That at all times hereinafter mentioned, United Industrial Workers of America, Amalgamated Local 286, (hereinafter referred to as Amalgamated Local 286) a labor organization maintaining its offices in Chicago, Illinois, was a representative of employees who were engaged in an industry affecting interstate commerce.

"2. That at all times hereinafter mentioned, Angelo Inciso, the defendant herein, was an officer and official of Amalgamated Local 286.

"3. That from on or about . . . [date], to and including on or about . . . [date], and periodically

* All "App." references are to the pages of the Appendix filed in the U.S. Court of Appeals, Seventh Circuit.

throughout such period of time at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, Angelo Inciso, defendant herein, did unlawfully wilfully and knowingly cause Amalgamated Local 286 to receive and accept from . . . [corporate employer's name and address], an employer of said employees, engaged in an industry affecting commerce, a sum of money aggregating $..... [sum stated], more or less; in violation of Section 186 (b), Title 29, United States Code."

Save for varying dates of alleged violations, different employers named in each count, and various stated sums of money, the 22 counts are otherwise unchanged throughout the indictment, which as part of its caption cites Title 18, U.S.C. § 2.

On January 18, 1957 defendant filed his motion (App. 7) to dismiss that indictment and on May 24, 1957 the motion was denied (App. 9).

For the Court's convenience we have arranged and distilled some of the salient facts.

In substance, each of the above Chicago concern executives, called on behalf of the Government, testified on direct examination, with respect to the period of time involved in the corresponding count in the indictment:

1. The percentage or dollar volume of sales made or delivered by their respective companies, to firms outside the State of Illinois.
2. Membership of employees in Local 286.
3. That Inciso represented the Union in wage negotiations.
4. Identified Government Exhibits consisting of various checks payable, sent to, and endorsed by Local 286.
5. That checks were sent to Local 286 for dues, initiation fees and insurance.

It was stipulated (App. 314) between counsel for the parties that all of the checks which had been marked as Government Exhibits and which were made payable to the Local Union were in fact received by Amalgamated Local 286 in Chicago, Illinois, and were deposited to the Union's general account.

No useful purpose would be served by a more detailed statement of the evidence of the employer witnesses.

On cross examination, it appeared that these officer and executive witnesses did not make or authorize the periodic or "aggregate" payment to Local 286 with any unlawful purpose in mind; that the payments were not made to gain any benefit or advantage with the Union; nor to curry favor with Inciso; nor to bribe him, and that none of the companies involved, nor their officers and employees, had been indicted or prosecuted in any fashion for having made those payments.

Senator Paul Douglas (App. 226, 227), called by the government, testified he presided over the December, 1955 hearings of the Senate sub-committee of the Committee on Labor and Public Welfare. He presided over the hearings reflected on certain pages of Government's Exhibit 23-2 (App. 228). The Senator stated Angelo Inciso testified before the Committee (App. 230). The witness stated (App. 228) that the testimony in Government's Exhibit 23-3 accurately reflected the testimony that took place before his Committee.

Francis Hall (App. 247), a government witness, was employed by Local 286 from the latter part of September, 1954 to April, 1959. Mr. Inciso hired her as secretary and bookkeeper (App. 247), and told her he was President of the Local (App. 249). He had control of union affairs.

On cross-examination the witness stated that when checks would come in from various employees the entire

check was deposited in the Union bank account, and then from that sum she drew a check to pay the insurance company premium (App. 255).

Renate Stone (App. 260), a witness on behalf of the Government, was employed by Local 286 from July or August, 1951 to September or October, 1954. She did stenography, took care of the books and insurance. Mr. Inciso told her what her duties were (App. 261). She identified various Government Exhibits. Inciso told her to deposit incoming checks in the Union bank account (App. 265). When she received a check in the mail, it was deposited in the bank (App. 266), and she took the lists and gave credit to each member as to who had paid insurance and who had paid dues and initiation fees. Albert DeVito became President while this witness was employed there, but he gave her no instructions as to her duties (App. 266-267). She testified under cross-examination (App. 268) that she was not paid by Inciso.

Albert DeVito (App. 275) was President of the International Union, United Industrial Workers of America, prior to May, 1959 (App. 275, 276). Inciso hired him in 1945. The witness became President of Local 286 in 1952 (App. 287), and later Mr. Inciso (App. 288) told him he was no longer President, that he (Inciso) was taking over as President. Thereafter the witness resumed being a business representative (App. 288).

All of the Exhibits received in evidence at the trial below were transmitted to the Court of Appeals and filed as part of the record on appeal. These original Exhibits fall into three (3) main groups: (1) correspondence, (2) contracts between various employees and Local 286, and (3) cancelled checks to which are attached names of employees covered by insurance.

All original cancelled checks transmitted as Exhibits are payable to the Union and endorsed by the Union for deposit in the Union bank account.

At the trial below the following excerpts (App. 320 to 329) from the purported testimony given by the defendant Inciso at hearing before the Senate sub-committee of the Committee on Welfare & Pension Funds, were read to the jury in this manner and form [Mr. Quan and Mr. Monaghan were the Assistant United States Attorneys prosecuting this case]:

> "Mr. Quan: We had planned to do it this way: I was going to read the statements of Mr. Inciso and Mr. Monaghan was going to ask the questions so there wouldn't be any confusion in the minds of the jury. In other words, I would play the part of Mr. Inciso and he would read the questions.
>
> The Court: Is that agreeable with you, Mr. Callaghan?
>
> The Court: Under those circumstances, as long as both parties agree to it, we will proceed accordingly. Bring in the jury.
>
> Mr. Quan: It is all right for me to take the stand?
>
> The Court: Mr. Monaghan will read the questions and Mr. Quan will read the answers to the questions.
>
> Mr. Quan: I will be Mr. Inciso. I will make his replies.
>
> The Court: All right: You may proceed.
>
> Mr. Quan: Page 1506.
>
> Mr. Quan: (Reading):
>
> Mr. Inciso: All the money that comes into the local union comes in by check. We have negotiated these things as we went along, as the contracts would expire. All managements were negotiated and told.
>
> Mr. Monaghan: (Reading):
>
> Mr. Cotter: Were what, sir?
>
> Mr. Quan: (Reading):
>
> Mr. Inciso: Told. I explained it to them, that we are negotiating a raise in dues—I mean, in wages, and

that there was no talk of them having anything to do with any insurance. As far as we are concerned it is dues as such. How they broke it down is their business.

I have seen it broken down in various different ways. I have asked these managements how come and they have various different explanations for it, but as far as I am concerned I negotiated all of these agreements. They were negotiations in wages as such.

I heard various arguments, such as some management would say, 'Well, what is the difference? I agree to give it to you in wages, but if I have to pay it in wages I have to pay overtime. I don't want to pay overtime in it.'

I told them that is their business, but as far as I am concerned it is dues as such and we would tell the membership that our dues were being raised to $9.15.

Mr. Monaghan: (Reading):

Mr. Cotter: From how much?

Mr. Quan: (Reading):

Mr. Inciso: From $3.00.

Mr. Monaghan: Referring now to page 1509:

Mr. Cotter: It is your position that any money that comes in, for instance, even though the company sending in the contribution states on those billings that it is for insurance and so much is for dues, it is your version that anything that actually isn't used for premiums and forwarded on to the insurance company is dues and treated as general funds of the Local?

Mr. Quan: (Reading):

Mr. Inciso: That is correct.

Mr. Monaghan: Page 1510.

Mr. Quan: (Reading):

Mr. Inciso: We would accept $9.15 as dues. How the management made up the sheet, that was their business. I am not going to argue with them how they done it.

Mr. Monaghan: (Reading):

Mr. Cotter: Just a minute on that. You raised the dues from $3.00 to $9.15 and then they sent in some dependents' insurance, did they not?

Mr. Quan: (Reading):

Mr. Inciso: That is right.

Mr. Monaghan: (Reading):

They must have had some knowledge that this was for insurance.

Mr. Quan: (Reading):

The dependents' insurance?

Mr. Monaghan: (Reading):

No. The difference between your $3.00 and your $9.15.

Mr. Quan: (Reading):

No, sir.

Mr. Monaghan: (Reading):

Wasn't there any discussion with the various managements that this money was going for insurance?

Mr. Quan: (Reading):

None whatsoever.

Mr. Monaghan: (Reading):

Why was it, then, that consistently, month after month, practically all of these companies when they sent you this gross amount of $2,700 or $3,300 listed it as insurance, so many employees at $5.15, $6.15 or whatever the agreement was, and they then listed dues for so many heads aggregating so much, initiation fees all separate, and in some of the instances we have mentioned they sent it in two checks to make it distinct? How could they so uniformly get the impression that it was insurance and insurance in a specific amount if you had just talked dues with them?

Mr. Quan: (Reading):

I had never talked dues with the management. It is none of his business what our dues are.

Now, you had one management here to testify that he himself sent me a check with the insurance company's name on it. I took it back to him and told him, 'It is not insurance, it is dues.' After a lengthy discussion he finally agreed.

Mr. Monaghan: Page 1512.

Senator Allot: I would like to ask you one or two

questions about these funds. Why is it that you want to try and tell this Committee here that in all your bargaining with these employers some thirty odd, aren't there—

Mr. Quan: (Reading):

Yes.

Mr. Monaghan: (Reading):

—that you have never mentioned insurance.

Mr. Quan: (Reading):

No.

Mr. Monaghan: (Reading):

You stated a few minutes ago.

Mr. Quan: (Reading):

I never negotiated with them for any insurance as such.

Mr. Monaghan: (Reading):

Did you negotiate with them for benefits?

Mr. Quan: (Reading):

I negotiated with them for wages.

Mr. Monaghan: (Reading):

Did you tell them what you wanted it for?

Mr. Quan: (Reading):

No. We just wanted a raise in pay.

Mr. Monaghan: Page 1513.

Mr. Quan: (Reading):

Now, as far as we are concerned, we have always negotiated dues. Now, certainly management may from time to time have said, 'How come you are raising your dues?' and we have told them that certainly that we are going to give the people insurance, but that is our business alone. As far as you are concerned, it is dues. You take it out of the people's pay and send it to us as dues.

Mr. Callaghan: (Reading):

Mr. Inciso: Let me tell it my way. I stated to them that we were negotiating wages. We notified them our dues were being changed.

Senator Allot: Notified whom?

Mr. Inciso: Management, through a letter that our dues were going to be raised. At one time was $8.15, and you see, we don't negotiate all the shops at one

time. We negotiate them as our contracts expire, and we have two companies that don't have any at all with us.

I told these managements that we would send them a letter and we were raising our dues, though we had always talked about it at membership meetings. Many of them asked me what it was for, why so high. I said, 'Because we ourselves are going to have an insurance for the simple reasons, one, our insurance is cheaper and better than they could get, and two, if any employee leaves the shop, quits or retires, he could still carry the insurance right through our office.'

Mr. Monaghan: Page 1532.

Senator Allot: Now, I am very interested in these records that you kept.

Mr. Monaghan: (Reading):

Senator Allot: Now, I am very interested in these records that you kept. You received money each month from employers, as you now say, upon dues, but which was conveyed to you in many instances in the form of insurance premiums and also dues. That was received, I suppose, generally around the first of the month?

Mr. Quan: (Reading):

Between the 1st and the 10th.

Mr. Monaghan: (Reading):

Between the 1st and the 10th, and what was done with those checks? Were any of them ever paid in cash?

Mr. Quan: (Reading):

No. They were all paid in checks with the exception of one company, the people who pay in cash. There was about seventeen people, or maybe twenty people at the most.

Mr. Monaghan: (Reading):

What company was that, just to make the record clear?

Mr. Quan: (Reading):

I am almost sure it is R. G. Haskins.

Mr. Monaghan: (Reading):

Will you speak up just a little more, Mr. Inciso?
Mr. Quan: (Reading):
I will.
Mr. Monaghan: (Reading):
Now, what did you do with those checks?
Mr. Quan: (Reading):
Well—
Mr. Monaghan: (Reading):
Did you handle them?
Mr. Quan: (Reading):
No. As the checks would come in Mrs. Hall would get them and she would deposit them in the bank.
Mr. Monaghan: (Readng):
In the bank?
Mr. Quan: (Reading):
In the regular account in Chicago.
Mr. Monaghan: (Reading):
In the what?
Mr. Quan: (Reading):
In the regular account in Chicago.
Mr. Monaghan: (Reading):
Now, when they were deposited, was there any breakdown made between the allocation for insurance and for dues?
Mr. Quan: (Reading):
Yes; there would be.
Mr. Monaghan: (Reading):
On your records?
Mr. Quan: (Reading):
Our records would show, sir.
Mr. Monaghan: (Reading):
Didn't show on your deposit slips?
Mr. Quan: (Reading):
I don't recall. I don't think it did.
Mr. Monaghan: (Reading):
Would it show on a voucher that was prepared at that time?
Mr. Quan: (Reading):
Yes, it would.
Mr. Monaghan: (Reading):

In other words, if a check was for $1,000 or for $915.00, to make it easy, it would show $6.15 to insurance, or $5.15, whichever way you kept your records, and $300 to dues?

Mr. Quan: (Reading):

Yes. It would show an amount for dues and show an amount for insurance. We would break it down.

Mr. Monaghan: Page 1534:

Mr. Cotter: Do you know anything about the Taft-Hartley law, Mr. Inciso?

Mr. Quan: (Reading):

I don't believe I know it all, because there are so many pages and so many changes, but I have a knowledge of some of it.

Mr. Monaghan: (Reading):

Is there any possible violation involved in the way you have handled these insurance contributions?

Mr. Quan: (Reading):

I don't believe there is, as far as I know because we handled them as dues as such.

Mr. Monaghan: (Reading):

Did you get legal opinion with respect to this before you did it?

Mr. Quan: (Reading):

No, I didn't.

Mr. Monaghan: (Reading):

Pardon?

Mr. Quan: (Reading):

No, I didn't.

Mr. Monaghan: (Reading):

Wouldn't you want to know whether you were violating the law or not?

Mr. Quan: (Reading):

No, because I believe we had a right to do whatever we wanted with dues as such. We had a case on that before the Courts in the Delta Star Electric Company. It was taken before the Board and the Board ruled in our favor, that dues were dues as such and we had a right to do whatever we saw fit with them. The Board appealed that case.

Mr. Monaghan: (Reading):

Actually it was insurance, wasn't it?

Mr. Quan: (Reading):

No. As far as I was concerned, it was dues.

Mr. Monaghan: (Reading):

That is just for make believe, isn't it?

Mr. Quan: (Reading):

No As far as—

Mr. Callaghan: Just a minute. If your Honor please, your Honor admitted these as statements. I respectfully submit that what the Senator's conclusion may have been about this and his statement may not be considered as any admissions made by this Defendant or in any other wise against this Defendant, what the Senator said. What the Defendant said here is only important.

The Court: Are you objecting?

Mr. Callaghan: Yes. I am objecting to this, if your Honor please.

The Court: To this one question put by the Senator?

Mr. Callaghan: I am objecting to any further reference throughout this transcript to what the Senator may have said or what any questioner may have said. I respectfully submit that a limitation be put on this as to what the Defendant may have said at those hearings.

The Court: The objection will be overruled. You may read the question again, Mr. Monaghan.

Mr. Monaghan: (Reading):

That is just for make believe isn't it?

Mr. Quan: (Reading):

No. As far as I am concerned there is no make believe. It is dues.

Mr. Monaghan: (Reading):

When you got some of these companies finally to send their contributions in as dues, what did that column on the side mean as to dependents?

Mr. Quan: (Reading):

The dependents covered the man paying for it each time. Now the management pays it.

Mr. Monaghan: (Reading)·
That was dependents' insurance?
Mr. Quan: (Reading):
Some would be dependents' insurance.
Mr. Monaghan: (Reading):
So although you insisted and perhaps did get some of them to comply with sending this in as dues, it was patent on the face that part of it still was insurance because they were sending their dependents' insurance along?
Mr. Quan: (Reading):
Their dependents' insurance would be sent to dependents' insurance, but the rest of it, as far as I was concerned, was dues.
Mr. Monaghan: (Reading):
Even though it is really for insurance?
Mr. Quan: (Reading):
We in turn turned around and we buy insurance with some of that money.
The Court: That concludes the reading?
Mr. Quan: Yes. The Governments rests."

After the Government rested its case in chief (App. 329) defendant moved for a judgment of acquittal (App. 329) and the Motion was denied.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

There are several special and important reasons for granting review on writ of *certiorari* in this case.

The United States Court of Appeals for the Seventh Circuit has decided, in substance, the following:

1. Testimony given before a Senate Sub-Committee of the Committee on Welfare and Pension Funds may be freely utilized and read to the trial jury by the Government, as part of its case in chief during a subsequent criminal prosecution under §302 (b) of the Labor-Management Relations Act of 1947 and 18 U.S.C.A. §2 (b):

A. Despite the fact that concededly . . . "None of the employers named in the indictment were mentioned by name in the Senate Testimony" (Opinion below).

B. Though Inciso, defendant below, did not take the witness stand at his trial.

C. Even though Inciso was not charged with, nor on trial for perjury.

D. Despite 18 U.S.C. §3481 provides, *inter alia,* that a defendant's failure to make a request to testify "shall not create any presumption against him;" implementing U.S. Constitution. Amendment V.

II. The prosecutor's argument to the jury, concerning this purported Senate Testimony to the effect that Inciso ". . . lied, and he lied all the way through," "these statements are not true," he was "lying his head off," was, in substance, according to the Seventh Circuit, harmless and not an infringement of Inciso's Constitutional and statutory rights.

III. That the heavy punishment for a statutory misdemeanor "was authorized by statute," even though §302 of the Labor-Management Relations Act of 1947 fails to clearly spell out the unit of prosecution appropriate here. In short, the Seventh Circuit held that "causing the unlawful receipt from each employer was a distinct punishable offense," (Opinion below), rather than failure to establish a statutory trust fund.

IV. That in face of the clear mandate of §302 (a) of the Act prosecuting and punishing employers for engaging in the behavior they testified about, as government witnesses, the Court of Appeals held it was not error for the district judge to refuse defendant's requested instructions concerning credibility.

Questions raised in this petition concerning use, by the government, of the purported Senate Testimony have not been, heretofore, settled by this Court. Such federal questions should be settled by this Court because of the inter-play between constitutional and statutory rights and the power of Congressional Committees to elicit testimony. Moreover, the concepts of "fair play" developed and expounded by this Court require determination of the problems presented here.

Moreover, the Court of Appeals has decided questions regarding the unit of prosecution, and fragmentation of offenses, contrary to the cases reported as *Ladner* v. *U.S.*, 358 U.S. 169 (1958), *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), and *Ex Parte Snow*, 120 U.S. 566 (1887).

As part of its case in chief, and over defense objections (App. 228) the trial Court permitted (App. 318) the Government to read as admissions against interest (App. 316, 317, 318) excerpts from Government Exhibit 23-5, purporting to be testimony given by the defendant Inciso when he was a witness before the Committee on Labor and Public Welfare of the United States Senate in July, November or December, 1955. (App. 227).

Senator Paul Douglas testified (App. 228) below, that during December, 1955 he presided over hearings of the sub-committee of the Committee on Labor and Welfare, and he testified (App. 228) concerning whether Government Exhibit 23-1 reflected the testimony taken before his committee.

During (App. 227-228) the proceedings below, the prosecutor stated:

> "We call the Senator, your Honor, to show the testimony that was given before his committee, the testi-

> mony of the Defendant, wherein the defendant made certain admissions against interest and showed he knew he was violating the law at the time he did what he is charged with doing."

Just before resting (App. 329) its case in chief the government read into the record fragments of testimony purportedly given by Inciso when testifying at the Committee hearing. (App. 320 to 329).

Now it must remain uppermost in mind that the defendant had not testified at his trial in the District Court. Yet the trial Judge ruled, with respect to the alleged Senate Committee testimony just quoted, "After examining them [pages in Gov't. Exh. 23-5] the Court is of the opinion that these are *admissions against interest* which may be read to the jury at this time. . ." (App. 318).

From even a cursory reading of the so-called Senate Committee testimony it is readily apparent that there is nothing whatever in it connecting that material with the indictment on which the Government was proceeding here. Plainly, the excerpts of Committee testimony are abstract, unrelated recitations. They are as inflammatory as they are irrelevant. Assuming for the purpose of argument only, that this testimony was admissible, which we deny, there is *wholly absent any evidence* that the employers or sums of money vaguely referred to in sub-committee testimony are the ones charged in the indictment.

During his argument (App. 349) to the Jury on behalf of the Government, Mr. Quan urged:

> "In December, 1955, Mr. Inciso appeared before the Senate Sub-Committee headed by Senator Paul H. Douglas of Illinois. The Senate Sub-Committee was investigating welfare and pension fund plans. Mr. Inciso told the Committee at that time in response to their questions that he didn't think he was violating

the law because all of the money the union received was all dues. He told them that he never negotiated any insurance with employers.

"Well, ladies and gentlemen, his Honor will instruct you later on that that is an exculpatory statement, that is, a statement which tends to show that a man is innocent, and if proven to be false, is conscious evidence of guilt, in other words, if he made a false statement and he knew it was false at the time he made it.

"Mr. Callaghan: I object to that as an incorrect statement of the law, your Honor please.

"The Court: The objection is overruled. Proceed.

"Mr. Quan: He knew at the time he made this false statement that it was false. Such a statement is evidence of guilt of the Defendant, Angelo Inciso.

"Now, did Mr. Inciso lie to the Senate Sub-Committee about this, when he said all this money was dues? *Certainly he lied. Certainly he lied. Why did he lie?* Because he knew that if he admitted to the United States Senate that this money was insurance and that he knew it was against the law to receive this insurance money, he would be confessing. Mr. Inciso did not confess . . ." (Italics added)

Strangely enough there was absolutely no basis for impeachment—the defendant having elected to exercise his constitutional privilege, and there were no defense witnesses at the trial in the District Court. Nor was Inciso on trial for perjury before the Senate Committee. Moreover it requires no citation of authorities to support the elementary principle that the prosecution may *not* in the first instance introduce evidence of bad character. That is the Government attorney, for example, told the jury, regarding the defendant—"Certainly he lied. Certainly he lied" (App. 344).

We say the plain error arising from allowing the Government to read excerpts from the purported Senate Com-

mittee testimony was compounded when the trial Court instructed the jury over defendant's objection:

> "An exculpatory statement is one which clears or tends to clear from alleged fault or guilt. However, an exculpatory statement when shown to be knowingly false is circumstantial evidence of guilty consciousness and has independent probative value as evidence." (App. 378).

It was prejudicial error to permit introduction and reading of the so-called Senate Committee testimony, for any purpose in the trial below.

Nothing in those disconnected passages from that testimony tended to prove the issues between the Government and the defendant on trial in the District Court. We submit that the Government could not use that irrelevant testimony by way of anticipatory impeachment of this defendant who had *not* testified at his trial.

Just what was the legitimate foundation for introducing the Senate Committee testimony at the criminal trial below is never disclosed by the record here on review. Just how an unconnected statement by this defendant before a Senate Committee becomes relevant in a prosecution under §302(b) and 18 U.S.C. §2(b) is never established. The defendant made no confession of guilt. [See again the prosecutor's argument to the jury: ". . . that he knew it was against the law to receive this insurance money, he would be confessing. Mr. Inciso did not confess." (App. 344).]

Since the proceeding below was not a trial for perjury before the Senate Sub-Committee, the Government attorneys erected a straw exculpatory statement so they could strike it down with flourish and prejudice at the trial.

To say, as the trial court did in its charge, quoted above, that the so-called exculpatory statement is con-

verted into "independent" probative evidence presses this matter far into the area of prejudicial error. For this amounts to substituting an *ex parte* statement for testimony of the defendant who did not testify.

In its last analysis, admission of some unrelated questions and answers purportedly taken at the Senate Sub-Committee hearing was plain, prejudicial and reversible error. Certainly nothing contained in that hodge-podge of testimony bore any relation to the credibility of the defendant who had not testified, nor could it be used to impeach him before, and in the event, he testified. The prosecution accomplished what it wanted the Jury to think; that he was a "bad man", and this was reflected by their verdict—the inference of guilt prevailed through this shabby device.

Again, during the closing argument to the jury on behalf of the government, we find the Assistant United States Attorney telling the fact finders:

> "Now, is there any doubt in your mind that he didn't know what he was doing, that he didn't know this was against the law? Then he goes before the Senate Committee and there he gets himself into a real box. He started right off—
>
> Mr. Callaghan: If your Honor please, I object to counsel reading from any document.
>
> The Court: The objection is overruled. You may proceed.
>
> Mr. Monaghan: He states—
>
> Mr. Callaghan: I object to him reading the evidence in this case to this jury, if your Honor please. He may give his interpretation of the evidence, he may argue the evidence and he may comment on it, but he may not read the evidence to the jurors.
>
> The Court: The objection is overruled.
>
> Mr. Monaghan: He states:
>
> 'As far as I am concerned, it is dues.'

They are talking about the money that is coming into the union.

'As far as I am concerned, it is dues as such and we would tell the membership that our dues were being raised to $9.15.'

He refers in here also to the fact that they sent out letters to all of the employers saying 'Our dues are now $9.15.'

Where are the letters? If it was dues, ladies and gentlemen, we wouldn't be here. If this money went into a trust fund, none of us would be here. *He lied, and he lied all the way through.*

He said, 'It's dues, we don't negotiate insurance with them.' Mr. Callaghan on his own cross examination said, 'Well, now, wasn't that 4 cents an hour raise that you gave them, wasn't that to take care of insurance?' Some of the employers said yes, it was, and some said, 'No, that was negotiated separately', but he tells these people he didn't negotiate, he didn't talk about it.

Finally even that position becomes untenable and he tries to push it off and he says, 'Well, we talked about it a little bit and I told them we had a better program.' Certainly he did. He negotiated and he told these people they had to take it.

Now, he refers to a statement here as to what they told management, what he told management in regard to these statements made before the Senate Committee. I suggest to you that *these statements are not true*, and if they are not true there must have been a reason why he would go down to Washington and testify in such a fashion.

There is only one answer to that. He knew it was wrong the way he was doing it, and he couldn't admit it. He couldn't go down there and tell them. 'This is the way I am handling it.' He tried to escape by the one method left to him: dues.

Now, all of these letters you are going to have in the jury room. All of them talk about insurance and dues, insurance and dues, everybody knows it is insurance, and that is why the Senator later on here said to Mr. Inciso:

'This is just make believe, isn't it?'
Inciso says, 'Oh, no. It's not make believe.'
He perjured himself.—
Mr. Callaghan: That is objected to.
Mr. Monaghan: (Continuing)—*he lied* to these people—
Mr. Callaghan: That is objected to, if your Honor please.
The Court: The objection is overruled. Proceed.
Mr. Monaghan: (Continuing)—and then after he goes down and he gets the warning again, he goes over this whole problem of health and welfare, for two days he appears before the Senate Committee, and if I may say, *lying his head off*, and then he comes right back and within three months he is after Wisconsin Can, 'The dues are $3.00, the insurance is $6.15, send it to us and we will take care of everything'' . . . (App. 365-367)
". . . The only person whom I suggest it is conclusively proven has lied at all is Inciso. He is the liar . . ." (App. 368).

To be sure all the foregoing portions of the government attorneys' arguments to the jury are highly inflammatory, U.S. Constitution, Amendment 6. But such argument goes beyond even that to the point of attempting, and unfortunately successfully, to convict this defendant by his silence in the Court below, and prejudice him before the jury.

We think it manifest from the face of this record that Inciso's constitutional privilege and statutory immunity against self incrimination during the trial below was breached by the prosecutors' argument predicated upon the purported testimony given before the Senate subcommittee. Of course, the excerpts of sub-committee testimony had no place in the case below and without them there would have been no evidentiary basis for the im-

proper attack on the non-testifying defendant's credibility —which had not been put into issue by him.

Section 3481, 18 U.S.C., provides: "On trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his *own* request, be a competent witness. His failure to make such request *shall not create any presumption against him.*" (Italics added, 62 Stat. 833).

This is no new traditional assumption for we deal here with a realistic breach of constitutional and statutory protection surrounding the defendant. The persistent unfounded attack on Inciso's veracity before the Senate sub-committee is a repeated commentary on his failure to testify at the trial below. Congress, when it freed the accused in a criminal case from common law disability against testifying in his own behalf carefully mandated, *inter alia*, that: "His failure to make such request [to testify] shall not create any presumption against him." (18 U.S.C. §3481, 62 Stat. 833.) Congress, accordingly, recognized that implicit in the privilege against self-incrimination (U.S. Constitution, Amendment 5) is not only the right to remain silent, but more important, the right not to have that very silence give rise to an inference of guilt. *Helton* v. *United States*, 221 F. 2d 338 (5th Cir. 1955).

Clearly the arguments by government counsel carefully created a presumption against Inciso. No more striking example of telling a jury that defendant can not take the stand, can be imagined. The framework of reference in which the prosecutors' presented their arguments made Inciso's silence below, the central rather than any peripheral concern.

When reading the opinion of the Seventh Circuit it must be constantly borne in mind there is absent any

case cited or discussed where a federal reviewing court has tolerated any such instance of Senate testimony now infecting this record. There is simply no case where the points or issues were presented as in the case below or in this petition.

It is well settled that a court cannot permit a defendant to be tried on charges that are not made in the indictment returned against him. Perjury before the Senate sub-committee is *not* a charge in the indictment against Inciso, yet he was in fact and result tried below on the charge of alleged perjury in his purported Senate testimony.

When this Court reads the opinion below, it will be readily apparent that the Seventh Circuit approved the use of the defendant's purported Senate testimony on these twin theories:

(a) as a false exculpatory statement, and

(b) as a manifestation of *mens rea*, "wilfully".

Most respectfully, we point up this passage in the opinion:

> "It is true that none of the employers named in the indictment were mentioned by name in the Senate testimony. However, *it is clear to us* that defendant was speaking about 30 odd employers and that 22 were named in the indictment and testified below."

There is absent from this record anything connecting up the employers named in the indictment with those who testified at the Senate hearing. By its statement that "it is clear to us", the Seventh Circuit was departing from the accepted and usual course of judicial proceedings because that Court is bound by the record on appeal, and must view the case solely on the record, and not what the Court assumes dehors the record.

In approving the admission in evidence of the Senate testimony as exculpatory of "the facts charged in the indictment", it is important for this Court to notice that Counts 1, 4, 6, 7, 10, 11, 12, 17, 19, and 20, charge offenses after December 5, 1955, the date of the defendant's appearance before the Senate Committee. Plainly, the purported Senate testimony could not be considered as falsely exculpatory of offenses which had not yet occurred.

Moreover, it is difficult to understand just how such testimony could be converted into a false exculpatory statement for consideration by the trial jury when there was no basis in the evidence from which the jury could draw a conclusion that the defendant lied before the Senate with respect to payments involved in the indictment. Indeed, the repetitious references by the prosecutors to Inciso as a "liar" had no specific basis in the evidence since no employers were named in the Senate testimony. In other words, the Court of Appeals, most respectfully, inadvertently disposed of the point on what appeared clear to the subjective view of the members of the panel rather than what is found in the record.

Accordingly, reliance upon 18 U.S.C., Section 3481, is of signal importance. The use of the Senate testimony coupled with the running commentary by the prosecutors clearly created a presumption against the defendant's absence from the witness stand on his own behalf.

There is a question embedded in this case concerning what Congress has made the allowable unit of prosecution. *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) A literal reading of the penalizing sections, §§302 (b) and (d) of the Labor Management Act of 1947 does not supply the answer. The penal provision [302(d)] of the Act is only a part of the scheme available for

enforcing the Act. Section 302(c) provides for restraint of violations. And we are treating here with a criminal provision which outlaws payments, with stated statutory exceptions, between employer and representative—Local 286, in this instance. But the defendant is brought into the picture via 18 U.S.C. §2(b), and since he is not charged as a "representative," he could not himself commit the offense laid in any counts bottomed on §302(b) of the Act. If there is any violation, which we deny, it arises out of the fact that Local 286 did not have the "trust fund" mentioned in §302(c)(A) of the Act. We think it plain that the lack of a "trust fund", the unit of prosecution, makes moneys received by Local 286 from employers a technical violation, (which we deny) under §302 of the Act; and certainly especially in an amalgamated union, such as Local 286, there would be only one such trust fund. Consequently, payments to Local 286, in the absence of a statutory trust fund is simply an offense continuous in character. There is a common element in all 22 counts, *viz.*: payments received by Local 286 when no statutory trust fund was in existence, and this is a continuous offense having duration and not an offense consisting of isolated acts. *Ex Parte Snow*, 120 U.S. 556 (1887). Since Congressional intent as to cumulative punishment is ambiguous the policy of lenity is applicable here.

Congress saw fit to class offenses under §302(d) of the Labor Management Relations Act of 1947 as a *misdemeanor*.[1] (29 U.S.C. §186(d), 61 Stat. 157) Yet the trial

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[1] "Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000.00 or to imprisonment for not more than one year, or both." 29 U.S.C. §186 (d), 61 Stat. 157.

Defendant was and is challenging the validity of all counts in the indictment at bar.

judge pronounced sentence as follows: ". . . On Counts 1 through 22 of the indictment, I direct that on each of the Counts the sentence be one year and a $1,000 fine; that on Counts 1 to 10 the sentence of one year are to run consecutively; and that on Counts 11 to 22 both inclusive they will run concurrently with the sentence on Count 10 of the indictment. That makes a total sentence here of 10 years, and a total fine of $22,000."

If for the sake of argument it be assumed that the indictment and conviction of this defendant was warranted (which we deny) then every one of the executives who testified for the Government in this case were vulnerable to prosecution under §302(a) of the Labor Management Relations Act of 1947:

> "It shall be unlawful for *any employer* to pay or deliver, or to agree to pay or deliver, any money or or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce." (29 U.S.C. §186(a), 61 Stat. 157. Italics ours).

It will be recalled that the indictment now before the Court charges Local 286 (not this defendant personally) as such statutory "representative." (App. 4-5). And that virtually all of these executive-employer-Government witnesses testified they had not been indicted[2] in connection with these alleged payments. Certainly a disparity in prosecution and ultimately in sentencing is plainly established by this record. Those government witnesses, if

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[2] With reference to these employers, government witnesses who were executives for such employers, the trial judge stated at the time of sentencing: "Now, as to the method and the manner in which this was entered into, it was voluntarily entered into, these insurance agreements, by many of the corporations. . . ." (App. 388. Emphasis added).

the charges are assumed to have vitality(which we deny), are principals in crime under §302(a). We think if the officials of the Sovereign see fit to withhold prosecution of persons falling clearly within the Congressional mandate of §302(a), then certainly some recognition must be accorded the disparity in sentencing of this defendant, for aught that appears in the record to be a technical violation[3] of a misdemeanor. For it must be recalled that the evidence established by the record contains nothing whatever about any payments directly or indirectly to this defendant.

But all this goes further since the all persuasive influence of the Senate Report and purported testimony before the Senate sub-committee becomes readily apparent when one reads the trial judge's comments (App. 389, 391-392, 396-397) at the time of sentencing. It must be borne in mind that the trial court is speaking of the *total* Senate Report and not just the excerpts read into evidence (See the reprint of excerpts in our Statement of the Case, *supra*). We have already pointed out the errors flowing from even the excerpts of this so-called testimony before the Senate Sub-Committee. The trial court, on the other hand stated: "Now, this Defendant, on the question of whether his acts were willful, testified before a subcommittee of the Labor and Public Welfare Committee of the United States Senate on December 5th, 1955. There he was under oath and there he testified that the $9.15 were for dues, not for insurance, but yes, they probably did pay some of it for insurance. With a full and complete

[3] We have raised the question of sentence in good faith. But by doing so we do not intend to waive nor concede any other points raised and presented. Indeed we expressly reserve and preserve all points and positions asserted in this Petition on behalf of the defendant.

knowledge of what the activities were, what each of the separate contracts were, he stated that the $9.15 was for dues." (App. 390). At the risk of being repetitious we again call the Court's attention to the fact that during the trial below the excerpts from the Senate sub-committee testimony were never tied up with nor connected to the employers named in the indictment. Consequently this record does not show the bearing, relevancy, or relation of that purported Senate Committee testimony to the indictment.

Certainly the vulnerable status of the executive-employer-Government witnesses is readily apparent and now we underscore the obvious propriety and need for the following instructions tendered by the defendant and erroneously refused by the trial Court:

(a) "Section 186(a) of the statute here in question makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

During the trial many employer witnesses testified in behalf of the Government in this case that they had paid the amounts or part of the amounts of money which are the subject of the respective counts of the indictment in connection with which these witnesses were called. These employer witnesses are shown by the evidence not to have been indicted or otherwise proceeded against for the acts about which they testified.

"You may take these facts into consideration when considering your verdict and in weighing the testimony of those employer witnesses and in deciding the credibility which should be attached to their testimony. It is for you to determine whether these

respective employer witnesses have received any reward or immunity from prosecution, and if you believe that any of these employer witnesses have received any such reward or immunity from prosecution, or hoped or believed that he had obtained or would obtain any such reward or immunity from prosecution, you may consider that fact when weighing the testimony of the respective employer witnesses." (D-24, pp. 338)

(b) "Section 186(a) of the statute here in question makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

There is evidence in this trial that none of the employer witnesses who testified for the Government in this case have been indicted or otherwise proceeded against for any violation of the foregoing statute.

You may take that fact into consideration when considering your verdict and in weighing the testimony of those employer witnesses and in deciding the credibility which should be attached to their testimony. The motive of the witnesses in testifying is always important and if you believe that any witness has testified because of any hope or promise of immunity from prosecution, you many consider that fact in deciding the credibility of such witness." (D-25, App. 339)

There is nothing in the *given* instructions that would dilute the impact of the Government's witnesses and put them in their proper setting for the jury. Since weight and credibility are for the fact finders the defendant was prejudiced by the lack of the above quoted instructions. Indeed we think that the trial Court invaded the province of the jury by virtually giving status to the Government's

witnesses through its failure to give the defendant's requested instructions.

What we have just said concerning the refused instructions goes further since the Court disposes of our point on this phase of the case by referring to the one instruction concerning credibility of witnesses. (Opinion, p. 12) A realistic appraisal of the problem concerning refused instructions about Government witnesses will show that the defendant was asking that the jurors be told that they could consider whether the employers received a sheltered position in exchange for their testimony.

In the indictment at bar there should have been averments showing that Inciso, defendant, was a "representative" of employees and that if the act he allegedly caused to be done, if directly, performed by him would be an offense under § 302(b). Unless Inciso was charged with being such a "representative" his alleged acts, if directly performed by him, would not be violative of § 302(b). An act lawful in itself cannot be made criminal by imputing wrong motives to this defendant's alleged conduct. After all, § 302(b) purports to be a criminal statute *malum prohibitum* and only those actors coming within its limited ambit as "representatives" are held accountable.

We also note that the wording in the indictment, *e.g.* "Angelo Inciso, defendant . . . did unlawfully, wilfully and knowingly *cause* Amalgamated Local 286 *to receive and accept* from . . . [employer's name] . . . a sum of money . . ." stops short of the statutory phraseology found in 18 U.S.C.A. § 2(b). In other words the pleader ignored the balance of 18 U.S.C.A. § 2(b)—"which if directly performed by him would be an offense against the United States." But this last quoted laanguage from § 2(b) is the indispensable ingredient for liability in this situation, and

its absence from the indictment is fatal. *Pettibone* v. *United States*, 148 U.S. 197, 203.

Since this indictment fails to charge that defendant is a member of the class of actors who would be punished under §302(b) of the Act, if the forbidden acts even performed, it runs afoul of Rule 7, Fed. R. Crim. P., which in part pertinent here, mandates:

> "The indictment . . . shall be a plain, concise and definite written statement of the *essential facts constituting the offsense charged* . . . ." (Italics added. 18 U.S.C.A., Rule 7).

It must be constantly borne in mind that only "representatives" of employees are forbidden by, and punishable under, § 302(b) for engaging in the behavior proscribed by that section. Consequently, charging defendant as a "representative" of employees is an essential fact required to be set forth in the indictment.

With respect to Incisco this defendant now before your Honors charges no offense under § 302(b) or 18 U.S.C.A. § 2. *White* v. *U.S.*, 67 F. 2d 71 (10th Cir. 1933).

To restate it simply: Section 186(b) of Title 29 deals solely with a class of persons. It is not the usual criminal statute punishing "any person" or "whoever shall." It proscribes the activities only of "representatives". Defendant was not so charged. It is no answer to say that Inciso was not charged with receiving money but rather with "causing" the Union to receive it. In order to be amenable to Section 2(b) of Title 18, U.S.C.A., one must cause "an act to be done which if *directly performed by him* or another would be an offense against the United States." The act "performed by him" must be in the capa-

city of a "representative" or there is no offense against the United States.

From among the welter of Government Exhibits and testimony of its witnesses several significant signposts emerge worthy of attention. After all this is simply a prosecution for a misdemeanor, but one pursued with all the fury of the gravest felony. Yet despite the voluminous record and appendix:

1. There simply is nothing established in the evidence that any money was ever paid to the defendant Inciso.

2. This record is also barren of any evidence showing that any of the moneys involved reached Inciso's own pockets.

3. There is absent any evidence whatsoever establishing fraud, extortion, or threats by the defendant.

4. The existence of the insurance, mentioned by Government witnesses, is unassailed and it is uncontroverted to be valid and bona fide. No attack was ever made by the prosecution on the quality and legitimacy of such insurance.

5. All executives who testified for the Government on behalf of the employers named in the defective indictment clearly violated §302(a) of the Labor Management Relations Act of 1947 if the Government's theory of prosecution here is correct (which we deny).

6. When Senator Paul Douglas was testifying at the trial below on behalf of the Government he did *not* identify, nor name, any employers about whom Inciso

was questioned at the Senate sub-committee session, and accordingly the excerpts of Incoso's purported testimony received in evidence at the trial were never connected up with the employers named in the indictment.

7. The purported excerpts of testimony of Inciso before the Senate sub-committee was given in December, 1955 yet it was received in evidence to infect all counts in the indictment laid even after that date since no employers were identified or named in those pieces of testimony.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN
105 West Adams Street
Chicago 3, Illinois

MELVIN F. WINGERSKY
1002 Laura Lane
Marion, Illinois
Attorneys for Angelo Inciso, Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1960—April Session, 1961.

No. 13058
United States of America,
Plaintiff-Appellee,
v.
Angelo Inciso,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 30, 1961.

Before Hastings, Chief Judge, Schnackenberg and Castle, Circuit Judges.

Hastings, Chief Judge. Defendant Angelo Inciso was charged in a 22-count indictment with the violation of Section 302(b) of the Labor-Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C.A. §186 (b) and 18 U.S. C.A. §2(b).

Following an extended trial by jury and a verdict of guilty on all counts as charged in the indictment, defendant was adjudged to be guilty and sentence was imposed by the trial court. From this judgment defendant has appealed.

The errors relied on for reversal arise out of adverse rulings on various defense motions, rulings on evidence and instructions. The sufficiency of the evidence to prove the allegations of the indictment is not contested.

The relevant portions of the statutes above referred to are as follows:

Section 186(b) and (d), Title 29, U.S.C.A., reads:

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

Section 2(b), Title 18, U.S.C.A., reads:

"§2. Principals

• • •

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717."

Count I of the indictment is typical of each one of the twenty-two counts returned October 23, 1956 and reads:

"1. That at all times hereinafter mentioned, United Industrial Workers of America, Amalgamated Local 286, (hereinafter referred to as Amalgamated Local 286) a labor organization maintaining its offices in Chicago, Illinois, was a representative of employees who were engaged in an industry affecting interstate commerce.

"2. That at all times hereinafter mentioned, Angelo Inciso, the defendant herein, was an officer and official of Amalgamated Local 286.

"3. That from on or about March 16, 1956, to and including on or about October 15, 1956, and periodically throughout such period of time at Chicago, Illi-

nois, in the Northern District of Illinois, Eastern Division, Angelo Inciso, defendant herein, did unlawfully, wilfully and knowingly cause Amalgamated Local 286 to receive and accept from Wisconsin Can Company, 5437 South Massasoit Avenue, Chicago, Illinois, an employer of said employees, engaged in an industry affecting commerce, a sum of money aggregating $2,390.80, more or less; in violation of Section 186(b), Title 29, United States Code."

Save for varying dates of alleged violations, different employers named in each count and various stated sums of money, the remaining twenty-one counts are otherwise unchanged throughout the indictment. As a part of its caption the indictment cites Title 18, U.S.C.A. §2, supra.

The total amount of money defendant is charged in the twenty-two counts with causing Local 286 to receive and accept from the various employers, in violation of the statutes involved, is $420,267.76, as particularly set out in the table below.[1]

[1]

COUNT	AMOUNT	EMPLOYER COMPANY	PERIOD OF PAYMENTS
I	$ 2,390.80	Wisconsin Can Co.	3-16-56—10-15-56
II	9,307.97	Briskin Mfg. Co.	6- 3-52— 9-21-53
III	9,169.09	Illinois Coil Spring Co.	8-17-53— 3-13-54
IV	22,166.50	Chicago Pottery Co.	10-27-54—12-13-55
V	811.90	Munton Mfg. Co.	2-11-55—11-10-55
VI	7,596.17	Titan Abrasives Co.	4-18-55—12-16-55
VII	1,874.45	Armstrong Bray and Co.	7-15-53—12-15-55
VIII	21,045.14	Sheldon Machine Co. Inc.	7-15-53— 7-15-54
IX	8,611.80	Armstrong Bros. Tool Co.	7-17-53— 7-15-54
X	3,019.80	Johnston and Chapman Co.	7- 9-53—12-15-55
XI	5,826.05	Illinois Lock Co.	12-16-54— 2- 9-56
XII	58,254.28	Chicago Lock Co.	5-21-52—12-20-55
XIII	29,761.65	Duro Metal Products Co.	7-24-53— 9-20-54
XIV	6,252.10	Harris & Reed Mfg. Co.	1-12-53—11-11-55
XV	13,394.35	Precision Paper Tube Co.	10-21-54— 1-10-56
XVI	60,161.80	Dixie Cup Co.	8-13-53—10-14-55
XVII	16,213.28	A.B.T. Mfg. Corp.	6-13-54—12-15-55
XVIII	6,054.99	Navidico, Inc.	1- 1-54—10-31-55
XIX	59,828.47	National Video Corp.	1- 1-54—12-31-55
XX	46,896.62	Milled Screw Products Co.	9- 1-52—12-31-55
XXI	10,866.00	Mojonnier Dawson Co.	3- 3-52—11-30-55
XXII	20,764.70	Payson Mfg. Co.	6-13-52—11-11-55
Total	$420,267.76		

In substance, considering the evidence in the light most favorable to the Government, the record demonstrates that the following factual situation could have been found by the jury beyond a reasonable doubt. The twenty-two employers were industries engaged in interstate commerce; their employees were members of and represented by Local 286; negotiations were conducted with defendant and others on behalf of Local 286 and contracts resulted therefrom; they made periodic payments to Local 286 consisting of dues and insurance payments at the direction of defendant; and they kept records showing the breakdown of the payments to Local 286 into the two categories of insurance and dues.

There was evidence that defendant was the "boss" of Local 286 and exercised complete domination and control over it; he was in complete control over all negotiations with the employers; and he directed or controlled the arrangements leading to the payment by the employers of monthly dues of $3.00 per employee and additional monthly payments of from $5.15 to $6.15 per employee for insurance.

There was evidence that Local 286 recorded the receipt of such payments by the employers allocating a certain amount for dues and other amounts for insurance; these funds were placed in its general account and were not placed in a health and welfare trust fund; thereafter, it purchased insurance with such funds, except that it retained in its treasury the sum of $1.00, plus certain interest on the remainder, of each of such monthly insurance payments by the employers and did not purchase insurance with such retained amounts.

There was evidence that in late 1950 or early 1951 defendant had prepared an agreement concerning a proposed trust fund to be set up between the employers of members of Local 286 and Local 286 for health and welare benefits, and this was the only way health and welfare payments could be made or received without violating the Taft-Hartley Act, but defendant abandoned such a plan.

I

By proper and timely motions defendant unsuccessfully challenged the validity of the indictment in the trial court.

He asserts that the indictment is fatally defective because it fails to charge him as a "representative" under Section 186(b), supra, claiming that only "representatives" are inhibited thereunder. He contends that the indictment should have directly alleged such a representative capacity on defendant's part as to constitute an offense by him under the Act; else it falls short of the requirement of Section 2(b), supra, that the act caused to be done must be one "which if directly performed by him or another would be an offense against the United States."

Defendant further charges invalidity on the grounds that the indictment is vague, indefinite and uncertain; that it furnishes him with no information upon which he could predicate his defense; that such deficiencies amount to a violation of his constitutional rights under the Sixth Amendment; and that it runs afoul of the requirements of Rule 7, Federal Rules of Criminal Procedure, Title 18, U.S.C.A.[2]

It is agreed that the indictment does not charge defendant with receiving the money directly or with being a representative of the employees. Neither does it charge the various employers with a violation of the Act. The indictment here simply alleges in each count that defendant willfully and knowingly caused a representative of employees, Local 286, to receive money from the named employer of said employees engaged in an industry affecting commerce, in violation of law.

The Supreme Court in United States v. Ryan, 350 U.S. 299, 301 (1956), in defining the word "representative" as used in Section 186(b), supra, said:

---

[2] Rule 7 provides: "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

"The LMRA provides that the term 'representative' shall have 'the same meaning as when used in the National Labor Relations Act as amended by this Act.' §501(3). The pertinent definition appears in §2(4) of the NLRA: 'The term "representatives" includes any individual or labor organization.' 49 Stat. 449, 450, 29 U.S.C. §§151, 152(4)." (Emphasis added.)

The holding in Ryan has made it clear that it is a crime for a representative of employees, including labor organizations, to receive unlawful funds from employers. In the instant case, defendant by causing the crime to be committed by the union caused a crime to be committed by another as set forth in 18 U.S.C.A. §2(b), as amended in 1951, and is punishable as a principal. Defendant is not charged as an aider and abettor under the preceding subsection §2(a). Thus, we find that defendant is clearly charged with causing the commission of an offense which would be and is a crime if directly performed by another, i.e., Local 286.

The reviser's notes on this subsection (b) of Section 2, Title 18, supra, are pertinent to this consideration:

"Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as 'causes or procures'.

"The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who 'aids, abets, counsels, commands, induces or procures' another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.

"It removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even thouyh he intentionally refrained from the direct act constituting the completed offense.

"This accords with the following decisions: Rothenburg v. United States, 1918, 38 S. Ct. 18, 245 U.S. 480, 62 L. Ed. 414, and United States v. Hodorowicz, C.C.A. Ill. 1939, 105 F. 2d 218, certiorari denied 60 S. Ct. 108, 308 U.S. 584, 84 L. Ed. 489. United States v. Giles, 1937, 57 S. Ct. 340, 300 U.S. 41, 81 L. Ed. 493, rehearing denied 57 S. Ct. 505, 300 U.S. 687, 81 L. Ed. 888. 80th Congress House Report No. 304."

The courts have uniformly construed the word "cause" in harmony with the foregoing notes to mean a principal acting through an agent or one who procures or brings about the commission of a crime. One acting in such capacity is chargeable as a principal in the crime and punishable accordingly. United States v. Kenofskey, 243 U.S. 440, 443 (1917); United States v. Sheridan, 329 U.S. 379, 391 (1946); United States v. Leggett, 7 Cir., 269 F. 2d 35, 37 (1959), cert. denied, 361 U.S. 901; Pereira v. United States, 5 Cir., 202 F. 2d 830, 836-37 (1953), affirmed, 347 U.S. 1, 8-9 (1954); Boushea v. United States, 8 Cir., 173 F. 2d 131, 134 (1949).

We hold that by causing Local 286 to receive money in violation of Section 186(b), supra, defendant was properly charged as a principal under Section 2(b), Title 18, supra.

Further, we fined no merit in the contentions of invalidity of the indictment on the other foregoing grounds asserted by defendant. The indictment is a "plain, concise and definite written statement of the essential facts constituting the offense charged" and adequately apprised defendant of the charges against him. It fully meets the standards of sufficiency laid down by the courts in a long line of decisions. United States v. Debrow, 346 U.S. 374, 376 (1953); Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952); Glasser v. United States, 315 U.S. 60, 66 (1942); Hagner v. United States, 285 U.S. 427 (1932); United States v. Ansani, 7 Cir., 240 F. 2d 216, 223 (1957); Jelke v. United States, 7 Cir., 255 Fed. 264 (1918).

We hold that the trial court did not err in sustaining the validity of the indictment.

II

Defendant charges prejudicial error on the part of the trial court in permitting the Government, as a part of its case-in-chief and over defendant's objections, to read into evidence as admissions against interest certain excerpts from Government Exhibit 23-5. This exhibit was a transcript of testimony given by defendant Inciso when he was a witness before the United States Senate Committee on Labor and Public Welfare in July, November or December, 1955. The testimony was given before the Subcommittee on Welfare and Pension Funds, of which Senator Paul H. Douglas was chairman.

Senator Douglas, called as a witness by the Government in the instant case, testified in substance that he presided at the Senate Subcommittee hearing ; that defendant was the same Angelo Inciso who had testified before such subcommittee and the transcript of his testimony was a true and correct reproduction of what Inciso said at the hearings.

Testimony of the reporter who took the notes at the hearing and made the transcript was stipulated to the effect that the transcript was a true and correct reproduction of the stenographic notes taken at the time of the testimony. Accordingly, the document was introduced and received into evidence. A proper foundation was laid for such introduction of this testimony if it was otherwise shown to be relevant and material.

Defendant did not testify in the trial below and rested his case without the introduction of any evidence on his own behalf. He contends that the introduction of the Senate testimony was for the purpose of impeaching and degrading him in the eyes of the jury.

Defendant complains that the excerpts of his testimony before the Senate Subcommittee which were read to the jury were irrelevant and immaterial and never connected to the indictment or the issues on trial. In any event, he urges that they were not admissible for any purpose.

The issues in this trial concern the receipt of non-dues payments by the union. Aside from this challenged testimony, the Government had previously established by proper evidence the factual background set out earlier herein. That part of defendant's Senate testimony read to the jury disclosed he testified that all money the union received was dues; that the dues were raised from $3.15 to $9.15 per month and were checked off from the members' pay; that there was never any discussion about insurance with some thirty employers; that he knew something about the Taft-Hartley Act; that there was no violation in the way his union handled the insurance money because it was all dues as such; that he notified the employers that dues had been changed to $9.15; that all the money that came into the union was for dues (except certain additional payments for employees' dependents insurance); that there were some thirty odd employers and that he told them the payments were all dues and that "we are going to give the people insurance, but that is our business, as far as you are concerned it is dues. You take it out of the people's pay and send it to us as dues."

It is true that none of the employers named in the indictment were mentioned by name in the Senate testimony. However, it is clear to us that defendant was speaking about thirty odd employers and that twenty-two were named in the indictment and testified below. It is quite apparent that defendant was speaking about money for insurance paid into the union when he referred to all of it as dues. Defendant was attempting to demonstrate that the union was not violating the law because all of the money the union received was dues taken from the employees' pay.

This testimony, plus his further statement that he never discussed insurance with the employers, was read to the jury and could reasonably have been found to be false. The testimony of the employers in the trial was to the contrary. Furthermore, two months after testifying before the Senate Subcommittee, defendant sent a letter to Wisconsin Can Company, wherein he told it to pay to

the union dues of $3.00 and insurance of $6.15 per man per month. Subsequently, the union received such payments from this employer, and these insurance payments are the subject of Count I of the indictment.

Since we read defendant's Senate testimony as exculpatory of the facts charged in the indictment, and since it was by other separate evidence shown to be untrue, such testimony was admissible as a false exculpatory statement. United States v. Vittoria, 7 Cir., 284 F. 2d 451, 453 (1960); United States v. Farina, 2 Cir., 218 F. 2d 62, 63 (1954).

But if we assume that the Government failed to demonstrate that defendant in his Senate testimony was referring to the twenty-two employers named in the indictment, the statement nevertheless was relevant and admissible as proof of defendant's awareness of the prohibitions of Sections 186(b) and (d).

Knowledge or awareness of the law is generally irrelevant in proving mens rea in major felony convictions. Further, in certain "public policy" crimes, strict liability is imposed. However, in many such crimes, the sanction is limited to a fine or short jail term. Here, on the contrary, a fine of $10,000 per violation and a year's imprisonment can be imposed for disregarding the provisions of Section 186(b) and (d). We hold that the term "willfully violates" in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section.

Defendant's Senate testimony served this purpose—it demonstrated his awareness of the necessity of receiving funds solely upon the conditions of Section 186(c).[3] Such

[3] Section 186(c), 29 U.S.C.A., in relevant part provides:
"(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) * * *."

testimony, offered by the Government in its case-in-chief, was relevant and material on the question of guilty knowledge, intent and willfulness. It demonstrated that defendant had knowledge of the pertinent provisions of the Taft-Hartley Act for violations of which he was later indicted. It was relevant to the issue that when he caused the violation to occur he did so knowingly and willfully.

Requiring proof of awareness of the restrictions contained in Section 186(b) and (d) is consistent with the Government's repeated explanation why the employers named in the indictment were not charged with a similar violation. In its brief, the Government stated:

> "[T]he reason for the defendant alone being charged is obvious. The statute requires that the action of the defendant be wilful. Defense counsel's cross-examination of company officials effectively scotched this complaint against the employers as each denied that they knew this was wrong • • •."

Earlier, in closing argument before the jury, Government counsel further indicated its theory of Section 186(b) and (d):

> "[Government counsel]: Now, [defense counsel] refers to the fact that none of the employers are on trial here. [Defense counsel] cleared that up for you you when he asked them whether or not they had any intent to violate the statute. Did they know that what they were doing was wrong? They answered him, 'No, I didn't.'
>
> "He wants to know, why aren't they here? Well, that is the reason they are not here. That is why they are not charged. Mr. Inciso is the man who knew and he knew from the beginning when he started this, and we will ask you to read when you go to the jury room at the very beginning of it, his trust agreement that he wanted to set up. He knew that this was wrong."

Since the statement was admissible on either of the grounds indicated, it could not constitute prejudicial error to defendant.

III

Defendant has asserted that a number of additional errors require the reversal of his conviction. Each may be treated summarily.

First, he asserts that the proof shows only a single punishable event under Section 186(b) and (d)—a course of conduct by defendant that caused the receipt by Local 286 of non-dues payments from twenty-two employers. However, under Section 186(b) the willful receipt from each employer (except under the specific circumstances of Section 186(c) which includes approved insurance plans) is made unlawful. Korholz v. United States, 8 Cir., 269 F. 2d 897 (1959), cert. denied, 361 U.S. 929. In the instant case the Government alleged and proved that on twenty-two occasions defendant caused Local 286 unlawfully to receive non-dues payments from twenty-two separate employers. Causing the unlawful receipt from each employer was a distinct punishable offense.

Defendant contends that the court's instructions to the jury on 18 U.S.C.A. §2(b) are plain error. We have read the instructions and, considered as a whole, they adequately and correctly informed the jury of the provisions of that Section.

In addition, defendant argues the court erred in refusing to give his proffered instruction concerning the credibility of witnesses. Again, inspecting the instructions as a whole, including the one dealing specifically with the credibility of witnesses, we find that the jury was fairly and properly instructed.

Finally, defendant contends that the trial court grossly abused its discretion in imposing the challenged sentence on defendant. Relevant and controlling is our recent statement that the "punishment imposed was within that authorized by that statute and on the record and under

the circumstances here involved it was not excessive United States v. Coduto, 7 Cir., 284 F. 2d 464, 469, cert. denied, 365 U.S. 881; United States v. Chicago Professional Schools, Inc., et al., 7 Cir., concurring opinion, April 26, 1961." United States of America v. Leo Shaffer, et al., 7 Cir., Nos. 12852-12867, ... F. 2d ..... (June 13, 1961).

We have considered all of the questions raised by defendant in this appeal and find no prejudicial error.

The judgment appealed from is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Friday, June 30, 1961

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

United States of America, Plaintiff-Appellee, No. 13058 vs. Angelo Inciso, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Thursday, August 17, 1961

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

United States of America, Plaintiff-Appellee, No. 13058 vs. Angelo Inciso, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing be, and the same is hereby Denied.

FILED
OCT 16 1961
JAMES R. BROWNING, CLERK

No. 412

In the Supreme Court of the United States

OCTOBER TERM, 1961

ANGELO INCISO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 412

ANGELO INCISO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 292 F. 2d 374.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1961 (Pet. App. 14a), and a motion for rehearing was denied on August 17, 1961 (Pet. App. 15a). The petition for a writ of certiorari was filed on September 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly received in evidence, as being falsely exculpatory, petitioner's testimony before a Senate committee that monthly

payments remitted by employers to his union as employees' insurance premiums were for union dues.

2. Whether it was improper for the United States Attorney to state in closing argument that petitioner "lied" in making such exculpatory statements.

3. Whether separate receipts of money by a representative of employees from different employers, in violation of 29 U.S.C. 186, constitute separate offenses for which consecutive sentences may be imposed.

4. Whether petitioner was properly convicted of violating the Taft-Hartley Act by causing a representative of employees to receive money from employers.

STATUTES INVOLVED

Section 186 of Title 29 of the United States Code provides in pertinent part:

* * * * *

> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> (c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in

compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents: * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Section 2 of Title 18 of the United States Code provides as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on all counts of a twenty-two count indictment charging violations of the Taft-Hartley Act (I R. 4–6, 406).[1] He was sentenced to imprisonment for one year on each count, the sentences on the first ten counts to be consecutive and on the remaining counts to be concurrent with the sentence on count 10, or a total of ten years. The court also imposed fines of $1,000 on each count, aggregating $22,000 (I R. 408). The court of appeals unanimously affirmed (Pet. App. 1a–13a).

Each count of the indictment charged that Amalgamated Local 286 of the Industrial Workers of America was a representative of employees of an industry affecting interstate commerce and that petitioner, as an officer of the local, caused it to receive a stated sum from a named employer, in violation of 29 U.S.C. 186(b). The total amount of money alleged by the various counts to have been received was $420,267.76 (I R. 4–6; Pet. App. 3a).

The evidence was uncontradicted that the employers named were all engaged in industries affecting interstate commerce. Also, there was no dispute that

[1] Appellant's appendix, appellee's appendix and an exhibit volume are herein referred to as "I R.", "II R." and "III R.", respectively.

Local 286 received the payments as alleged. There was no evidence that the payments fell within any of the exceptions named in the statute: (1) compensation for services rendered, (2) satisfaction of any court judgments, (3) sales in the regular course of business, (4) sums deducted from wages for union dues, or (5) payments into a trust fund for the exclusive benefit of employees or their dependents. There had been a claim by petitioner when he testified earlier before the Senate Subcommittee on Welfare and Pension Funds that the payments were union dues, but this contention was not renewed at the trial, except for a passing remark by counsel.[2] Petitioner's position was that there was "no sufficient showing here upon which to submit this case to the jury either on the question of willfulness or of scienter, or that he caused the acts in this indictment to be done by this union" (I R. 330).

1. The evidence showed that petitioner controlled Local 286. He was its president, except for a period of about fifteen months beginning in 1952 when Albert De Vito filled the office. Petitioner placed De Vito in office without an election, directed his actions and controlled the policy of the union, and then resumed the office himself, telling De Vito

[2] In support of one of his questions, petitioner's counsel said (I R. 35): "[I]t is our theory, if your Honor please, that all these moneys were deducted as dues, and when wage increases were inaugurated here, they were given so that the company could make these expenditures in connection with the purchase of this insurance." This theory was never further urged, either in the motion for judgment of acquittal (I R. 330) or in closing argument (II R. 7-20).

to take up his old position of business representative (I R. 287–289, 249). The local had no treasurer, and petitioner signed all checks (I R. 309).

In 1951, petitioner told De Vito that it was necessary under the Taft-Hartley Act that any money received for employees' insurance should go into a trust fund set up by agreement between employers and the union (I R. 276–279). Accordingly, letters were sent out to various employers enclosing a proposed trust agreement for employees' insurance. Then the matter was dropped and never further discussed (III R. 26, 90–100; I R. 121, 279).

For a time, the employers insured their employees with a private insurance company, but this was supplanted by an arrangement whereby a fixed sum was remitted monthly to the union for each employee, to be used for health and accident insurance (I R. 26, 65–66, 143).[3] Petitioner urged this change of system and gave as reason therefor that by purchasing a policy on a large group he could get better coverage than the individual employers could obtain (I R. 26, 49, 55, 73, 91–93, 102–103, 136, 163, 215). One employer testified that petitioner told him that he had an interest in the company through which the union insured (I R. 185). Another employer who at first refused to make his insurance payments to the union was confronted with a series of one-day strikes, which were called in the middle of a morning, to last the balance of the day.

[3] Originally the amount remitted was $5.15 for each employee insured, but this was later raised to $6.15 (I R. 27, 59, 61, 284). There was also payments for dependents' insurance, the amount of which varied with the number of dependents involved.

This continued daily until the employer acceded to petitioner's demand that insurance payments be made directly to the union (I R. 78–79, III R. 9–16).

The payments were regularly sent to the union by the employers with letters of transmittal and check-off lists which showed the names of the employees and the deductions from their pay of $3.00 for union dues and either $5.15 or $6.15 for individual insurance, plus payments for dependents (III R. 6–8, 23, 25, 29, 32, 39–40, 42, 51, 56, 63, 65, 71, 72, 77, 83–84, 87, 104; I R. 108, 137, 201, 241–242). In several instances petitioner asked the employer to prepare one check covering both dues and insurance (I R. 42, 98, 153).

When a check-off list was received, petitioner's secretary would see that it coincided with the amount of the accompanying check. The duplicate of the list would be forwarded to the insurance company, together with the union's check for the insurance premium, in an amount equal to $5.15 per employee, less 4% (approximately $4.94). The difference between that amount and $6.15 would remain in the union bank account (I R. 249–251, 319). Petitioner repeatedly recognized in his correspondence that these payments from the employers were for insurance.[4]

[4] Petitioner informed employers as to the amount to be remitted for insurance and dues (III R. 33, 47, 49, 53), requested that the check-off lists be in duplicate (III R. 34) and called attention to failures to make insurance deductions (III R. 78–80, 81). In one instance petitioner returned a check because it was made payable to the insurance company, rather than to the union (I R. 113). The employer prepared a letter replying that it was illegal to make such payments directly to

2. Senator Paul Douglas, chairman of a Senate Subcommittee on Welfare and Pension Funds, testified that petitioner appeared before the committee in December 1955 and that the transcript of his testimony was accurate (I R. 227–230). Petitioner objected to the transcript on the grounds that it was not such a document as could be used to refresh the witness' recollection and because it was not properly authenticated. The court overruled the objections, stating that the document was not being used to refresh the witness' recollection and that the objection as to authentication was premature (I R. 229–230). At the conclusion of the government's case, certain portions of the transcript were offered as admissions against interest. Over petitioner's sole objection "that no proper foundation has been laid for the use of the documents for the purpose of showing these admissions, or so-called admissions," the government was allowed to read those portions to the jury (I R. 317–318, 320–329).

Petitioner testified before the committee that, as the contracts with the various companies would expire, the employers would be told that there was an increase in dues. There was no talk of the employers having anything to do with any insurance. As far as the union was concerned, the payments were "dues as such"; how the companies broke them down was their business. There was no discussion with the companies that the difference was going for

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the union, citing the statute and setting forth its penalties (III R. 18). At a bargaining session he personally gave this letter to petitioner, who read it and left it on the table (I R. 125).

insurance. One company sent in a check with the insurance company's name on it and petitioner told him it was dues, to which the employer finally agreed (I R. 320–329).

Petitioner further testified before the committee that he was bargaining with some thirty-odd employers. Sometimes they had asked why the union was raising dues and petitioner had told them that the union was going to give the employees insurance. What he said was the union's business. As far as the employers were concerned, it was dues. He had also told them that the union could get insurance cheaper and better than they could. All but one of the employers made their monthly payments by check. The union would break these down between insurance and dues. Petitioner did not get a legal opinion. He did not believe that the union was violating the law, since these payments were all dues, even though the union bought insurance with some of the money.

In closing argument, the United States Attorney said a number of times that petitioner had lied and perjured himself in this testimony before the committee (I R. 365–368).

3. Prior to sentencing, petitioner's counsel made a plea for leniency, urging that there was no evidence of corruption or of wrongdoing by the petitioner (I R. 385–386). The court stated that the pre-sentence report showed that petitioner was a director of the insurance company which carried the insurance for the union members, which petitioner admitted (I R. 391); that the amount received by the union for insurance exceeded the premiums ac-

tually paid by approximately $94,000; that various expenses were charged against the union's general fund (in which the insurance receipts had been deposited), including the costs of diamond watches, rings, liquor and other gifts, and various trips; and that a second home in California (where the union did not operate) had been purchased for petitioner with union funds, and was being offered for sale at $75,000 (I R. 390–393, 395). Petitioner did not challenge any of these figures; he stated, however, that the California home had cost only $65,000, and was for sale at $75,000 (I R. 398).

ARGUMENT

1. Petitioner's testimony before the Senate committee was properly admitted as a false exculpatory statement. It was not offered, as petitioner contends, for the purpose of impeachment. Its purpose was to show that petitioner, aware that he had violated the law, was trying to conceal such violations by giving a false explanation to the committee of his conduct, namely, that the payments to the union were legal because they were all for dues. The destruction, suppression or fabrication of evidence is universally recognized as tending to show consciousness of guilt. A false exculpatory statement, as the court instructed the jury (I R. 378), has independent probative force. It was thus admissible whether the defendant testified or not. *Wilson* v. *United States,* 162 U.S. 613, 620; *Commonwealth* v. *Webster,* 5 Cush. 295, 300, 316;

II Wigmore, *Evidence*, § 278 (3d ed); cf. *Ashcraft* v. *Tennessee*, 327 U.S. 274.[5]

Petitioner urges that the testimony was improperly admitted because the employers mentioned therein were not identified. The original objections made when Senator Douglas was qualifying the transcript for admission were withdrawn and its exclusion was sought solely on the basis that a "proper foundation" had not been laid. Had the objection been seasonably made that the employers referred to by petitioner when he was testifying before the committee had not been identified, an effort could have been made to identify them at the trial.

In any event, the record indicates that they included the same employers who made the payments involved in this case. Petitioner testified before the committee that all the money came in by check between the first and tenth of each month (in the same amounts as shown by the evidence at the trial), and that he dealt with more than 30 employers. He described before the committee his method of handling these monthly payments, and stated this was the general practice that covered all employers. One incident he referred to before the committee—when an employer had sent

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[5] See also *United States* v. *Bando*, 244 F. 2d 833 (C.A. 2), certiorari denied, 355 U.S. 844; *United States* v. *Farina*, 218 F. 2d 62, 63 (C.A. 2); *United States* v. *Smolin*, 182 F. 2d 782, 786 (C.A. 2); *Andrews* v. *United States*, 157 F. 2d 723 (C.A. 5), certiorari denied, 330 U.S. 821; *United States* v. *Graham*, 102 F. 2d 436, 442 (C.A. 2), certiorari denied, 307 U.S. 643; *Seeman* v. *United States*, 96 F. 2d 732 (C.A. 5), certiorari denied, 305 U.S. 620; *United States* v. *Randall*, 27 Fed. Cas. 696, 702–703.

in a monthly check payable to the insurance company, but was prevailed upon to make the check payable to the union (I R. 323)—was identical to an incident described at the trial (I R. 117–125, III R. 17–19). The jury was fully justified in inferring that the 30-odd employers referred to in petitioner's testimony before the committee included the 22 employers who made the payments upon which the conviction is based.

2. While petitioner's testimony before the Senate committee was, upon its face, exculpatory, it remained for the jury to determine whether it was false. In determining that issue it was proper for the jury to consider the testimony of officers and employees of the various companies involved, the testimony of petitioner's associates in his union local, and the significance of his letters to various employers with regard to their payments each month and the check-off lists which accompanied them. The jury also properly considered petitioner's alleged conversation in which he said that it would be necessary for insurance payments to be paid into a trust fund in order to comply with the Taft-Hartley Act, his letters to employers submitting a proposed trust agreement to cover such payments, and his conduct when he was advised by one of the employers that payment of insurance premiums by the employer to the union was forbidden by law. The prosecutor committed no impropriety when he argued to the jury that, in the light of all these circumstances, petitioner had lied before the Senate committee.

Neither the prosecutor or the court ever suggested that any unfavorable inference should be drawn from petitioner's failure to testify at the trial. The prosecutor's argument that petitioner's false testimony before the committee was an attempt to conceal his violations was no more than a fair comment on the evidence. It no more violated petitioner's right to remain silent than would the application of the statutory presumption that unexplained possession of narcotics creates an inference of knowledge of illegal importation. *Yee Hem* v. *United States*, 268 U.S. 178, 185.

3. Petitioner's contention (Pet. 32–33) that all of the payments by the different employers constituted only a single offense[6] is refuted by the language of the statute. The Act provides that, except for certain payments specifically excepted, "It shall be unlawful for any representative of any employees * * * to receive or accept, or to agree to receive or accept, from the employer * * * any money or other thing of value." The offense is to receive an illegal payment from an employer, and the payments that petitioner caused the union to receive from 22 different employers were 22 separate offenses, not just a single offense. The employers were located in different cities, their contracts with the union came up for renewal at different times, and the payments covered

[6] Before trial, however, petitioner contended that the indictment improperly joined in a single count numerous payments, each of which would constitute a separate and distinct offense (I R. 8).

a two-year period. Plainly, the numerous payments by different employers were not just a single offense.

Nor is there merit to petitioner's contention (Pet. 33–35) that, because the offenses are misdemeanors, the consecutive sentences were improper. In deciding that the sentences for ten of the separate crimes should be served consecutively, the trial judge could properly consider the evidence that the offenses were committed with knowledge that the law was being violated, and the information in the pre-sentence report that substantial portions of the funds ostensibly received for insurance premiums had been diverted to petitioner's personal purposes.

4. Petitioner's argument (Pet. 38–39) that the indictment was defective because it failed to allege that petitioner himself was a representative of employees, overlooks the fact that he was charged and convicted of causing the union to receive illegal payments. Section 2(b) of Title 18 (*supra,* p. 4) provides that one who willfully causes an act to be done which, if performed by him or another would be an offense against the United States, is punishable as a principal. The receipt of the illegal payments by the union violated 29 U.S.C. 186(b); since petitioner willfully caused the union to receive such payments, he was properly convicted as a principal.

Furthermore, petitioner was also liable as a principal under 18 U.S.C. 2(a), which imposes such liability upon one who induces or procures the commission of a crime. By causing the union to violate the law, petitioner obviously induced and procured such violation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

OCTOBER 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

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vs.

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Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. CALLAGHAN
105 West Adams Street
Chicago 3, Illinois

MELVIN F. WINGERSKY,
1002 Laura Lane
Marion, Illinois
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Now comes Angelo Inciso, petitioner herein, by his attorneys, under and pursuant to this Court's Rule 24(4), and replies to the Brief for the United States in Opposition, as follows.

Mindful that at this stage our petition for writ of certiorari has as its prime purpose exhibiting substantial reasons for granting the writ, we confine this Reply to a showing of some critical deficiencies in the Government's Brief.

This is a singular case. And the Government by failing to find or cite any relevant decisions governing all the questions raised by Petitioner establishes the urgent need for review by this Court.

QUESTIONS PRESENTED.

Government's Brief pp. 1-2.

We stand on our "Questions Presented" (Petition, 2 to 6) and point out the Government has presented only a truncated version of the serious questions involved. Accordingly, we disagree that the Government's "Questions" fairly represent the points involved.

REPLY TO ARGUMENTS OF THE GOVERNMENT.

Par. 2 Government Brief, pp. 10 to 12.

Inciso, petitioner here, testified before the Senate subcommittee on December 5, 1955, and probably again on the next day [Appellant's Appendix 232; T.R. 809]. The indictment [Appellant's Appendix 6, or see Appendix to Petition at page 3a] shows counts charging violations some days *after* that purported testimony was heard and taken. Plainly testimony given *before* some of the days charged in the indictment has no bearing whatever on transactions allegedly taking place subsequent to the purported testimony. We think on that aspect the Government is urging a sort of anticipatory exculpation. In any event, the purported Senate testimony was smuggled into the District Court trial under a pseudo theory of a false exculpatory statement only for conversion into a vehicle for creating a presumption against Inciso. See, e.g., 18 U.S.C.A. § 3481. Since Inciso refrained from taking the witness stand during his trial below his credibility was not put in issue, and all comments that he was a "liar" were improper and highly prejudicial. The purported Senate testimony had no legitimate relevancy at the trial below.

In its Opinion the Seventh Circuit acknowledges, as we contended in that Court of Appeals, that: "It is true that *none* of the employers named in the indictment were men-

tioned by name in the Senate testimony. . . ." (Appendix to Petition, p. 9a. Italics supplied).

On page 11 of the Government Brief the Court is informed that the ultimate defense objection made to the admission of the purported Senate testimony was that "'proper foundation' had not been laid." Continuing on page 11 the Government states: "Had the objection been seasonably made that the employers referred to by petitioner when he was testifying before the committee had not been identified an effort could have been made to identify them at the trial." (Govt. Brief, p. 11). This contention, or perhaps excuse, rests upon the Government's misconception of trial tactics, and the law of evidence. Of course there is no legalistic reason why the defense must educate the prosecutors by pointing up their failure to tie in employers named in the indictment with those, if any, mentioned during Inciso's testimony before the Senate sub-committee. And the lack of foundation is manifested by utterly failing in identifying any employers named in the indictment as being one and the same as those, if any, about whom Inciso was testifying before the Senate committee. The Government has cut ground from under its own argument.

Again, on page 11 of its Brief, the Government, still speaking about the employers, states: "In any event, the record indicates that they included the same employers who made the payments involved in this case." We respectfully ask the Court to evaluate that bold assertion with the Seventh Circuit's statement already quoted above: "It is *true* that *none* of the employers named in the indictment were mentioned by name in the Senate testimony." (Appendix, Petition at Page 9a, Italics ours.)

If your Honors will read pages 13 to and including 21 of our Petition it will be apparent from the face of the Senate testimony, which we have reprinted as read to the trial jury, *that no employers are named* in it. We say the Government, by its approach here, has now demonstrated sound reasons for allowance of the writ.

How trial jurors could determine whether the so-called exculpatory statement was false without knowing the employers mentioned in it should be difficult for the Government to explain. Yet it blithely bridges, simply ignoring that inconvenient fact, from a fallacious premise to an unfounded conclusion. The Government's argument under paragraph 2 is fatally defective for want of named employers in the purported Senate testimony.

Any cutting edge seemingly possessed by *Yee Hem* v. *United States*, 268 U.S. 178 (1925), relied on by the Government in its Brief at page 13, is dulled by carefully reading that opinion. *Yee Hem* pivots on a statutory presumption, penalizing possession of opium, created by the Congress in its effort to control that drug. While this Court approved that particular statutory presumption, its use as analogy in the situation now before the Court is wholly unsound and unpersuasive. It must be recalled that *Yee Hem* was decided under an Act of Congress prohibiting importation of opium except under Treasury regulations, which, in turn, prohibited importation of smoking opium. The statute there in issue made it an offense knowingly to conceal opium illegally imported, and cast upon a defendant found in possession of smoking opium the burden of showing that he had not acquired it through illegal importation. The statutory presumption was sustained on the theory that no lawful purchase of smoking opium could occur in this country. Accordingly, such possession gave rise to "sinister implications." Mr.

Justice Sutherland, speaking for the Court in the *Yee Hem* case, concluded it was not unreasonable to create such a presumption of unlawful importation as the source of smoking opium the possession of which a defendant concealed. What we have just stated is taken, in part, from the majority opinion reported as *Tot* v. *United States*, 319 U.S. 463, 469 (1943), where Mr. Justice Roberts pointed out, *inter alia:*

> "Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.
>
> "Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision." (Footnote references omitted.)

This Court is now confronted with an abortive attempt by the Government to equate (Brief 12-13) a statutory presumption arising out of possession, with a clear invasion of petitioner's constitutional rights coupled with violation of statutory protection accorded him under 18 U.S.C.A. §3481.

Par. 3 Government Brief, pp. 13-14.

At this point the Government apparently declines to answer our contentions predicated upon the "trust fund" provision in the Statute discussed in our Petition.

We urged the (Petition, pp. 33 to 35) disparity in sentencing this defendant-petitioner, and the Government has left our particular contentions unanswered.

Par. 4 Government Brief, p. 14.

At the time the indictment, involved at bar, was returned § 302(b) of the Labor Management Relations Act of 1947 was aimed at "representatives" of employees. This indictment does not charge Inciso as such a "representative." Significantly the language of § 302, of the Act, was drastically changed (73 Stat. 537), and now provides, *inter alia*: "(b)(1) It shall be unlawful for *any person* to request, demand, receive, or accept, or to agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." (Italics supplied).

• • •

Having omitted all reference or answer to our Question 9 (Petition, pp. 4-5; 36 to 38) concerning defense instructions refused by the trial judge, the Government concedes its substance, vitality, and importance.

CONCLUSION.

For all of the matters and reasons heretofore stated in our Petition and now implemented by this Reply, together with the patent deficiencies readily apparent in the Brief in Opposition, it is respectfully submitted that the petition for certiorari should be granted and review allowed.

Respectfully submitted,

GEORGE F. CALLAGHAN
105 West Adams Street
Chicago 3, Illinois

MELVIN F. WINGERSKY
1002 Laura Lane
Marion, Illinois
Attorneys for Petitioner